

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2005

4 (Argued: November 14, 2005

Decided: August 22, 2006)

5 Docket No. 04-5337-cv

6 - - - - -
7 Natural Resources Defense Council, Pesticide Action Network North
8 America, The Breast Cancer Fund, Physicians for Social
9 Responsibility, New York Public Interest Research Group,
10 Farmworker Legal Services of New York, Citizens Campaign for the
11 Environment, Neighborhood Network Research Center, Citizens
12 Environmental Coalition, Mid-Hudson Catskill Rural and Migrant
13 Ministry, Environmental Advocates of New York,

14
15 Plaintiffs-Appellants,

16
17 v.

18
19 Stephen L. Johnson, Administrator, United States Environmental
20 Protection Agency,

21
22 Defendants-Appellees,

23
24 Captan Task Force, Makhteshim-Agan of North America, Inc.,
25 Sygenta Crop Protection Inc., Monsanto Company, Gowan Company
26 L.L.C., Bayer CropScience LP, CropLife America,

27
28 Defendants-Intervenors-Appellees.

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31 B e f o r e: WINTER, STRAUB, and RAGGI, Circuit Judges.

32
33 Appeal from a dismissal of a complaint for lack of subject
34 matter jurisdiction, Fed. R. Civ. P. 12(b)(1), in the Southern
35 District of New York (Gerard E. Lynch, Judge). We affirm.

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39 Appellees.
40

41 WINTER, Circuit Judge:

42 The appellants in this action are eleven public health,
43 environmental, religious and farmworker organizations, including
44 the Natural Resources Defense Council (collectively, the "NRDC

1 Appellants"). They appeal from Judge Lynch's dismissal of their
2 complaint for lack of subject matter jurisdiction.

3 The complaint challenged the Environmental Protection
4 Agency's ("EPA")¹ decision to leave in effect certain pesticide
5 "tolerances" (i.e., the maximum permissible amount of pesticide
6 residues on food) for five pesticides after a systematic
7 tolerance reassessment program required by the Food Quality
8 Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489.
9 Judge Lynch dismissed the complaint after concluding that 21
10 U.S.C. § 346a(h) (5) required such challenges to be reviewed only
11 in the courts of appeals after exhausting administrative review
12 processes. On appeal, the NRDC Appellants argue that Section
13 346a(h) (5) governs judicial review only of EPA decisions to
14 establish, modify, or revoke tolerances and that decisions to
15 leave tolerances in effect are reviewable in the district courts
16 pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§
17 701 et seq.

18 We affirm.

19 BACKGROUND

20 a) Statutory and Regulatory Scheme

21 The EPA regulates agricultural pesticides under two
22 interrelated statutes: the Federal Food, Drug, and Cosmetic Act
23 ("FFDCA"), 21 U.S.C. §§ 301-394, and the Federal Insecticide,
24 Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y.

1 FIFRA imposes a federal licensing scheme on the sale,
2 distribution, and use of pesticides. 7 U.S.C. § 136a(a) ("no
3 person in any State may distribute or sell to any person any
4 pesticide that is not registered" under FIFRA). A pesticide may
5 not be registered unless the EPA determines that "it will not
6 generally cause unreasonable adverse effects on the environment."
7 Id. § 136a(c)(5)(D). These environmental effects are analyzed,
8 in part, by referencing the FFDCA and the "human dietary risk"
9 that might arise from pesticide residues in or on food. Id. §
10 136(bb)(2).

11 To ensure the safety of consumers of pesticide-treated food,
12 the FFDCA empowers the EPA to establish "tolerances," which set
13 the maximum permissible level of pesticide residue on a
14 particular food, or to grant exemptions from the tolerance
15 requirement. 21 U.S.C. §§ 346a(a)-(c). Before any agricultural
16 commodity containing pesticide residue can be sold or
17 distributed, a tolerance (or exemption) meeting certain safety
18 standards must be promulgated by the EPA. 21 U.S.C. §§ 331(a),
19 342(a)(2)(B), 346a(a)(1)-(2). If no tolerance or exemption is
20 established, any food containing pesticide residue is deemed
21 "unsafe" and "adulterated" and may not be moved in interstate
22 commerce. Id.

23 The EPA may "establish or leave in effect a tolerance for a
24 pesticide chemical residue in or on a food only if the

1 Administrator determines that the tolerance is safe." Id. §
2 346a(b)(2)(A)(i). The term "safe" is defined to mean that "there
3 is a reasonable certainty that no harm will result from aggregate
4 exposure to the pesticide chemical residue, including all
5 anticipated dietary exposures and all other exposures for which
6 there is reliable information." Id. § 346a(b)(2)(A)(ii). Any
7 tolerance that is "not safe" must be modified or revoked. Id. §
8 346a(b)(2)(A)(i). If a pesticide is used on more than one food
9 crop, a separate tolerance (or exemption) must be established for
10 each pesticide-food combination.

11 In 1996, both FIFRA and the FFDCA were amended by the Food
12 Quality Protection Act ("FQPA"), Pub. L. No. 104-170, 110 Stat.
13 1489. The FQPA required that the EPA reassess the safety of all
14 then-existing tolerances -- over 9,000 -- and added to the FFDCA
15 a range of detailed, scientific factors to be considered in the
16 assessment of pesticide risks. 21 U.S.C. § 346a(b)(2)(C)-(D).
17 Included in these factors were new requirements pertaining to the
18 safety of infants, children, and other major identifiable
19 subgroups. Id. § 346a(b)(2)(C) ("an additional tenfold margin of
20 safety . . . shall be applied for infants and children" unless
21 the EPA "on the basis of reliable data" establishes a "different
22 margin of safety" that "will be safe for infants and children");
23 see also id. § 346a(b)(2)(D)(iv), (vi), (vii). Section
24 346a(q)(1) established a timetable for the reassessment of the

1 preexisting tolerances: 33% were to be completed by August 3,
2 1999, 66% were to be completed by August 3, 2002, and 100% were
3 to be completed by August 3, 2006. Id. § 346a(q)(1).

4 Under Section 346a(j)(3), a tolerance pre-dating FQPA's
5 enactment "shall remain in effect unless modified or revoked
6 under subsection (d) or (e) of this section [346a], and shall be
7 subject to review under" Section 346a(q). Id. § 346a(j)(3). In
8 conducting its review of a particular tolerance under Section
9 346a(q), the EPA must determine whether it "meets the
10 requirements of subsections [346a](b)(2) or (c)(2)," and if it
11 does not, "issue a regulation under subsection (d)(4) or (e)(1)
12 of this section [346a] to modify or revoke the tolerance or
13 exemption." Id. § 346a(q)(1).

14 A reassessment review under Section 346a(q), therefore,
15 leads to one of two outcomes: if the EPA determines that the
16 pre-existing tolerance meets the new safety standards of Section
17 346a(b)(2), the EPA leaves the tolerance in effect, and it is
18 considered reassessed under Section 346a(q); if the EPA finds the
19 pre-existing tolerance to be unsafe under Section 346a(b)(2),
20 then it must modify or revoke the tolerance pursuant to Sections
21 346a(d)(4) or (e)(1). Id. § 346a(q)(1).

22 The establishment, revocation, or modification of a
23 tolerance occurs under the procedures set forth in Sections
24 346a(d)-(g). Id. § 346a(d)-(g). Section 346a(d) describes the

1 procedures by which the EPA may establish, modify or revoke a
2 tolerance in response to a petition from the general public. Id.
3 § 346a(d) ("Any person may file with the Administrator a petition
4 proposing the issuance of a regulation . . . establishing,
5 modifying, or revoking a tolerance for a pesticide chemical
6 residue in or on a food."). Upon receiving a petition, the EPA
7 must first determine whether the petition meets the requirements
8 governing petition contents. Id. § 346a(d)(2). If the
9 requirements are met, the EPA must publish a notice of the
10 petition's filing within thirty days. Id. § 346a(d)(3). After
11 publishing the notice, the EPA must issue a final regulation
12 establishing, modifying, or revoking the tolerance; issue a
13 proposed regulation under the provisions of Section 346a(e) and
14 follow the procedures therein; or issue an order denying the
15 petition. Id. § 346a(d)(4)(A).

16 Section 346a(e)(1) describes the procedures by which the EPA
17 may, on its own initiative, "issue a regulation . . .
18 establishing, modifying, suspending . . . or revoking a
19 tolerance." Under Section 346a(e)(2), the EPA must issue a
20 notice of proposed rulemaking and generally provide at least
21 sixty days for public comment before issuing a final regulation.

22 Once a regulation or order is issued pursuant to Sections
23 346a(d)(4) or 346a(e)(1), "any person" may file objections to the
24 regulation or order within sixty days of its issuance,

1 "specifying with particularity the provisions of the regulation
2 or order deemed objectionable and stating reasonable grounds
3 therefor." Id. § 346a(g)(2)(A). A public evidentiary hearing on
4 the objections may be held, id. § 346a(g)(2)(B), but "[a]s soon
5 as practicable after receiving the arguments of the parties, the
6 Administrator shall issue an order stating the action taken upon
7 each such objection and setting forth any revision to the
8 regulation or prior order that the Administrator has found to be
9 warranted." Id. § 346a(g)(2)(C).

10 The only provision relating to judicial review in Section
11 346a is subsection (h). Id. § 346a(h). Under Section
12 346a(h)(1),

13 [i]n a case of actual controversy as to the
14 validity of any regulation issued under
15 subsection (e)(1)(C) of [§ 346a], or any
16 order issued under subsection (f)(1)(C) or
17 (g)(2)(C) of [§ 346a] . . . any person who
18 will be adversely affected by such order or
19 regulation may obtain judicial review by
20 filing [in the United States Courts of
21 Appeals] . . . a petition praying that the
22 order or regulation be set aside in whole or
23 in part.

24
25 Id. § 346a(h)(1). In sweeping language, Section 346a(h)(5)
26 provides that "[a]ny issue as to which review is or was
27 obtainable under this subsection shall not be the subject of
28 judicial review under any other provision of law." Id. §
29 346a(h)(5).

30 b) EPA's Implementation of the FQPA Amendments

1 Much of the tolerance reassessment program has been
2 conducted concurrently with a similar program under FIFRA to re-
3 evaluate pesticide registrations. See 7 U.S.C. § 136a-1. The
4 EPA has frequently used "Reregistration Eligibility Decisions"
5 ("REDs") and "Interim Reregistration Eligibility Decisions"
6 ("IREDs") to announce its decisions on tolerance reassessment and
7 pesticide re-registration. See, e.g., 62 Fed. Reg. 42,020 (Aug.
8 4, 1997); 65 Fed. Reg. 37,375 (June 14, 2000).

9 REDs for two pesticides at issue in this case, alachlor and
10 captan, were issued in 1998 and 1999, respectively. U.S. EPA,
11 Reregistration Eligibility Decision (RED): Alachlor (1998)
12 (available at <http://www.epa.gov/oppsrrd1/REDs/0063.pdf>)
13 [hereinafter "Alachlor RED"]; U.S. EPA, Reregistration
14 Eligibility Decision (RED): Captan (1998) (available, as
15 amended, at <http://www.epa.gov/oppsrrd1/REDs/0120red.pdf>)
16 [hereinafter "Captan Red"]. Concluding "that the established
17 tolerances for alachlor, with amendments and changes as specified
18 in this document, meet the safety standards under the FQPA
19 amendments," the EPA determined that of 38 tolerances, five
20 should be revoked and six should be modified to contain an
21 increased tolerance value. Alachlor RED at 181, 185-87. Making
22 similar findings with respect to captan, the EPA found that 61 of
23 the 66 tolerances needed some sort of adjustment. Captan RED at
24 62, 66-72.

1 The three other pesticides at issue in this case, diazinon,
2 disulfoton, and oxydemeton-methyl, are members of a large group
3 of pesticides known as organophosphates, which share a common
4 mechanism of toxicity and whose exposure can cause cumulative
5 effects on humans. See 67 Fed. Reg. 56,557, 56,558 (Sept. 4,
6 2002). Because the EPA determined that the cumulative risks of
7 several organophosphates, including diazinon, disulfoton, and
8 oxydemeton-methyl, made at most minimal or negligible
9 contributions to the overall risk associated with
10 organophosphates, the tolerances for these organophosphates were
11 maintained "regardless of the outcome of the [organophosphate]
12 cumulative assessment and any potential regulatory action taken
13 as a result of that assessment." 67 Fed. Reg. 56,557, 56,558
14 (Sept. 4, 2002); see also 67 Fed. Reg. 56,555 (Sept. 4, 2002); 67
15 Fed. Reg. 52,987 (Aug. 14, 2002); 67 Fed. Reg. 46,972, 46,974
16 (July 17, 2002); 67 Fed. Reg. 35,991, 35,993 (May 22, 2002).

17 c) District Court Proceedings

18 On September 15, 2003, the NRDC Appellants filed the present
19 action.² On December 23, 2003, an amended complaint was filed
20 challenging the EPA's reassessment and retention of tolerances
21 for 146 pesticide-food pairs involving five pesticides:
22 alachlor, captan, diazinon, disulfoton, and oxydemeton-methyl.
23 Specifically, the NRDC Appellants argued that the EPA's decision
24 to leave these tolerances in effect after reassessment was

1 improper because: (i) the EPA ignored its statutory duty under
2 the FFDCA to include an additional tenfold margin on safety in
3 order to protect infants and children; (ii) the EPA failed to
4 designate the children of farmworkers as a major identifiable
5 subgroup especially vulnerable to the reassessed pesticides;
6 (iii) for eleven organophosphates, the EPA left in effect
7 tolerances whose level exceeded the safe level for children; (iv)
8 for 120 tolerances, the EPA erroneously reduced the acute dietary
9 risk posed by the pesticide by relying on data based on the
10 estimated percentage of the crop treated with the pesticide; and
11 (v) in violation of FIFRA, the EPA unlawfully relied on a
12 confidential, proprietary computer model developed by the
13 pesticide industry to conduct 118 organophosphate tolerance
14 reassessments.

15 On March 25, 2004, the district court granted a motion to
16 intervene on behalf of an association of pesticide manufacturers
17 and distributors and several of its member companies (the
18 "CropLife Appellees"). All appellees moved to dismiss the
19 amended complaint on the ground that the district court lacked
20 subject matter jurisdiction because the language of Section
21 346a(h)(5) specifically precluded district court review of the
22 NRDC Appellants' challenges.

23 After holding that the disputed tolerance reassessments were
24 final agency actions, the district court granted the motions to

1 dismiss. It held that Section 346a(h) established an exclusive
2 procedure for obtaining judicial review and confined such review
3 to the courts of appeals. New York v. United States EPA, 350 F.
4 Supp. 2d 429, 437-46 (S.D.N.Y. 2004). Judicial review in the
5 district courts under the APA was therefore unavailable.

6 More specifically, the court found that the language of
7 Section 346a(h) (5):

8 clearly demonstrates Congress's intent to
9 preclude other avenues of review for
10 determinations issued under the subsections
11 to which it applies. Moreover, the
12 provision's broad language, specifying that
13 it covers "any issue as to which review is or
14 was obtainable," indicates an intention to
15 sweep in any challenge to an agency action
16 that could have been appealed through the
17 procedures it references, regardless of
18 whether such internal review was actually
19 pursued. That is, subsection [346a](h)
20 explicitly applies not merely to cases in
21 which administrative review was pursued, such
22 that appellate review is obtainable under
23 subsection [346a](h) (1), but also to cases in
24 which such review was obtainable had the
25 appropriate steps been taken. A litigant
26 challenging an administrative decision
27 governed by these provisions thus cannot, by
28 skipping the internal review procedures of
29 subsection [346a](g), avoid the jurisdiction
30 of the Courts of Appeals and proceed instead
31 to the District Courts under the APA, by
32 arguing that, in the absence of an order
33 under subsection [346a](g) (2) (C), subsection
34 [346a](h) (1) is inapplicable.
35

36 Id. at 438. The district court concluded that the NRDC
37 Appellants could have challenged the EPA's reassessment decisions
38 using the procedures of Section 346a(d) (1) -- i.e., by filing a

1 petition to establish, modify, or revoke a tolerance -- setting
2 in motion a chain of events leading to judicial review under
3 Section 346a(h). Because "a determination to leave an existing
4 tolerance in effect would be reviewable in exactly the same
5 manner as any existing tolerance," "determinations made pursuant
6 to subsection (q) to leave tolerances in place should [not] be
7 treated any differently than decisions to modify or revoke them."
8 Id. at 441.

9 The district court also dismissed the NRDC Appellants'
10 claims of jurisdiction under FIFRA. Id. at 446-47. The district
11 court held that because Section 346a(h) (5) limited review "under
12 any other provision of law," "FIFRA's grant of jurisdiction is
13 irrelevant." Id. at 446. Because the NRDC Appellants "challenge
14 the registration of pesticides under FIFRA only through their
15 challenge to the tolerances set under the FDCA," FIFRA did not
16 represent an independent source of jurisdiction in this case.
17 Id. at 446.

18 DISCUSSION

19 a) Standard of Review

20 "When reviewing a district court's Rule 12(b) (1)
21 determination of its subject matter jurisdiction, we review
22 factual findings for clear error and legal conclusions de novo."
23 Wake v. United States, 89 F.3d 53, 57 (2d Cir. 1996) (citation
24 and internal quotation marks omitted). Moreover "the court must

1 take all facts alleged in the complaint as true and draw all
2 reasonable inferences in favor of plaintiff." Sweet v. Sheahan,
3 235 F.3d 80, 83 (2d Cir. 2000).

4 b) Judicial Review under the APA

5 The APA provides that "[a] person suffering legal wrong
6 because of agency action, or adversely affected or aggrieved by
7 agency action within the meaning of a relevant statute, is
8 entitled to judicial review thereof." 5 U.S.C. § 702. This
9 provision permits review of "final agency action for which there
10 is no other adequate remedy in a court." Id. § 704. However,
11 review under the APA may be excepted where: (i) "statutes
12 preclude judicial review;" or (ii) "agency action is committed to
13 agency discretion by law." Id. § 701(a). These exceptions are
14 construed narrowly and apply only if there is "clear and
15 convincing evidence of legislative intention to preclude review."
16 Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 n.4
17 (1986); see also Abbott Labs. v. Gardner, 387 U.S. 136, 141 & n.2
18 (1967), abrogated on other grounds by Califano v. Sanders, 430
19 U.S. 99 (1977).

20 "Whether and to what extent a particular statute precludes
21 judicial review is determined not only from its express language,
22 but also from the structure of the statutory scheme, its
23 objectives, its legislative history, and the nature of the
24 administrative action involved." Block v. Cmty. Nutrition Inst.,

1 467 U.S. 340, 345 (1984); see also Bowen v. Michigan Acad. of
2 Family Physicians, 476 U.S. 667, 673 & n.4 (the presumption
3 favoring judicial review may be overcome by "specific language"
4 or "inferences of intent drawn from the statutory scheme as a
5 whole"). Indeed, the "clear and convincing evidence" standard is
6 met, "and the presumption favoring judicial review overcome,
7 whenever the congressional intent to preclude judicial review is
8 fairly discernable in the statutory scheme." Block, 467 U.S. at
9 350-51 (citation and internal quotation marks omitted). However,
10 the clear and convincing evidence standard is "a useful reminder
11 to the courts that, where substantial doubt about the
12 congressional intent exists, the general presumption favoring
13 judicial review of administrative action is controlling." Id. at
14 351.

15 Before addressing the NRDC Appellants' arguments that the
16 APA provides for judicial review in the district court, we must
17 determine whether the challenged decisions represent final agency
18 action. If the decision to leave certain tolerances in place is
19 not final action, APA review would be inappropriate. See In re
20 SEC ex rel. Glotzer, 374 F.3d 184, 192 (2d Cir. 2004) ("Judicial
21 review under APA § 702 is expressly conditioned, under APA § 704,
22 on the existence of a 'final' agency action.") (citing Darby v.
23 Cisneros, 509 U.S. 137, 146 (1993)). We agree with the district
24 court that the tolerance reassessments challenged were final

1 agency actions and adopt its reasoning.

2 c) Judicial Review Under the FFDCA

3 Because the EPA's tolerance reassessments represent final
4 agency action, the APA permits review in the district court
5 unless it is "fairly discernable" that Section 346a precludes
6 judicial review. Block, 467 U.S. at 350-51. In analyzing
7 whether Section 346a precludes judicial review under the APA, we
8 first note that the FDCA is unique in that it only commits
9 certain specific agency actions to appellate court review.
10 Cutler v. Hayes, 818 F.2d 879, 888 n.61 (D.C. Cir. 1987).
11 Because the FDCA contains no "single, overarching provision
12 governing judicial review" -- instead subjecting "discrete agency
13 actions" to specialized review provisions -- actions taken under
14 sections silent as to appellate review are "directly reviewable
15 in a district court under some appropriate head of jurisdiction,
16 for courts of appeals have only such jurisdiction as Congress has
17 chosen to confer upon them." Id.; see also Alabama Tissue Ctr.
18 v. Sullivan, 975 F.2d 373, 376 (7th Cir. 1992); Nader v. EPA, 859
19 F.2d 747, 754 (9th Cir. 1988) (holding EPA's rejection of
20 rulemaking petition was not an order appealable to the court of
21 appeals because the sections permitting appellate review allowed
22 such review only of orders issued under subsections not
23 implicated in the litigation).

24 Despite the absence of an overarching judicial review

1 provision, both the language and the statutory scheme of Section
2 346a indicate that the district court lacked jurisdiction to
3 adjudicate actions such as those brought by the NRDC Appellants.

4 Section 346a(h) (5) states that “[a]ny issue as to which
5 review is or was obtainable under this subsection shall not be
6 the subject of judicial review under any other provision of law.”
7 21 U.S.C. § 346a(h) (5). To determine whether the district court
8 has jurisdiction over the NRDC Appellants’ claims, therefore, we
9 must determine whether their claims constitute “issue[s]” as to
10 which review “is or was obtainable” under Section 346a(h). We
11 find that they do.

12 First, the language of Section 346a(h) (5) is quite
13 expansive. Section 346a(h) (5) is not limited to certain defined
14 actions or decisions; rather, its scope encompasses “[a]ny issue”
15 that could be addressed in the regulations and orders enumerated
16 in Section 346a(h) (1). As such, an analysis of Section 346a(h)
17 requires us to look behind the specific agency action or decision
18 being challenged and to consider the issue being asserted by the
19 plaintiff.³

20 Section 346a(h) (5)’s scope, however, incorporates only those
21 issues as to which review “is or was obtainable under this
22 subsection [346a(h)].” 21 U.S.C. § 346a(h) (5) (emphasis
23 supplied). Appellate review is limited, therefore, only to those
24 categories of issues to which review could have been obtained

1 under Section 346a(h) (1). By specifically referencing Section
2 346a(g) (2) (C), Section 346a(h) (1) permits review of those orders
3 issued pursuant to Section 346a(g).⁴ Section 346a(g), in turn,
4 permits objections to orders issued pursuant to Section
5 346a(d) (4), which resolve petitions to establish, modify, or
6 revoke a tolerance under Section 346a(d) (1).⁵ Thus, if it is or
7 was possible to obtain review under the administrative review
8 procedures of Section 346a(g), then Section 346a(h) limits
9 judicial review to the courts of appeals and forecloses such
10 review prior to the exhaustion of administrative remedies. Cf.
11 Nader, 859 F.2d at 753-54 (interpreting parallel pre-FQPA
12 provision of the FFDCA as requiring exhaustion of internal
13 procedures before challenging denial of petition for rulemaking
14 in court of appeals).

15 In mounting its challenge to those tolerance reassessments
16 left in effect, the NRDC could have raised (and indeed still can
17 raise) every issue presented in their complaint in a petition to
18 modify or revoke the tolerance pursuant to Section 346a(d) (1)-
19 (2). 21 U.S.C. § 346a(d) (1)-(2) ("any person" may petition for
20 an existing tolerance (or exemption) to be established, modified,
21 or revoked) (emphasis supplied). The NRDC Appellants' request
22 that the tolerances left in place be vacated and reassessed again
23 is tantamount to a request for modification or revocation.
24 Applying the criteria espoused by the NRDC Appellants would de

1 facto result in a reduction or revocation of the tolerance for
2 each of the challenged pesticide-food pairs. That the NRDC
3 Appellants have not explicitly sought modifications or revocation
4 via Section 346a(d) does not alter the substance of their claims:
5 the EPA's failure to apply the correct standards during the
6 tolerance reassessments resulted in approval of heightened
7 pesticide residue levels.

8 Had the NRDC Appellants filed a Section 346a(d) petition
9 requesting modification or revocation of tolerances based on
10 those issues enumerated in their complaint, the EPA would have
11 been required to act by: (i) issuing a final regulation (which
12 could vary from that sought in the petition) modifying or
13 revoking the tolerance; (ii) issuing a proposed regulation and
14 then final regulation pursuant to the procedures in Section
15 346a(e); or (iii) denying the petition. 21 U.S.C. § 346a(d)(4).
16 If the NRDC Appellants were dissatisfied with the EPA's
17 disposition of their Section 346a(d) petition to modify or revoke
18 the tolerances, they could have objected to it under Section
19 346a(g)(2)(A). The EPA then would have been required to issue an
20 order taking action on the objection. 21 U.S.C. § 346a(g)(2)(C).
21 If the NRDC Appellants were dissatisfied with the EPA's Section
22 346a(g)(2)(C) order, Section 346a(h) clearly allowed them to
23 obtain judicial review in the courts of appeal.

24 Hence, a challenge to a decision to leave a tolerance in

1 effect is an issue for which review was obtainable under Section
2 346a(h). As such, the NRDC Appellants are precluded from
3 obtaining "judicial review under any other provision of law." 21
4 U.S.C. § 346a(h)(5). Review in the district court under the APA,
5 therefore, is simply not proper for claims like those of the NRDC
6 Appellants. With respect to these types of claims, the text of
7 Section 346a(h) provides "clear and convincing evidence of
8 legislative intention to preclude review" under the APA. Japan
9 Whaling Ass'n, 478 U.S. at 230 n.4.

10 Furthermore, it is "fairly discernable" from the statutory
11 scheme that jurisdiction is not appropriate in the district
12 court. Block, 467 U.S. at 351. The NRDC Appellants' arguments,
13 if adopted, would lead to a scheme in which the same tolerance
14 would be subject to review by both the district courts and the
15 courts of appeals at the same time: One party could directly
16 challenge the EPA's decision to leave a tolerance in effect in a
17 district court using APA review while, simultaneously, another
18 party could trigger Section 346a(h) review in a court of appeals
19 by following the administrative review process established in
20 Section 346a(g) -- commencing with a Section 346a(d) petition to
21 modify or revoke the same tolerance. It is highly unlikely that
22 Congress intended to create a scheme involving multiple avenues
23 of review and potential contradictory results. No evident policy
24 goal would be served by such a scheme, and the statutory language

1 clearly suggests it was not intended.

2 The NRDC Appellants advance two main arguments in response.
3 First, they contend that a reassessment decision to leave a
4 tolerance in effect under Section 346a(q) is not one of the
5 enumerated types of agency action listed in Section 346a(h) (1),
6 see supra Note 3, and that Section 346a(h) (5) does not expand the
7 limited set of agency actions governed by Section 346a(h), see
8 21 U.S.C. § 346a(h) (5) ("Any issue as to which review is or was
9 obtainable under this subsection shall not be the subject of
10 judicial review under any other provision of law.") (emphasis
11 supplied). Second, the NRDC Appellants argue that Section
12 346a(q) is silent as to the review required for decisions to
13 leave tolerances in effect. In contrast to Section 346a(q)'s
14 requirements for tolerances that do not meet the new strictures
15 imposed by the FQPA, decisions to leave tolerances in place
16 require no additional action by the EPA under Sections 346a(d) or
17 (g), eliminating the applicability of Section 346a(h)'s judicial
18 review provisions.

19 We conclude that these arguments are unavailing. While it
20 is true that neither Section 346a(h) (1) nor (g) specifically
21 lists Section 346a(q) among the subsections to which it applies,
22 it does not follow that Section 346a(q) determinations to leave
23 tolerances in place are necessarily excluded from its coverage.
24 The plain language of Section 346a(h) (1) and (5) is to the

1 contrary. As discussed above, the language of Section 346a(h)(5)
2 references "any issue" for which review "is or was obtainable
3 under this subsection." We find it implausible that a challenge
4 to the EPA's decision to leave certain tolerances in effect is
5 not an issue for which review is and was obtainable under Section
6 346a(g)(2)(C) -- which is specifically mentioned in Section
7 346a(h)(1) -- through Section 346a(d). While the NRDC Appellants
8 are challenging an EPA action not enumerated in Section
9 346a(h)(1), the fact remains that they are challenging an issue
10 that does fall within the scope of Section 346a(h) because the
11 NRDC Appellants could have sought relief from the tolerance
12 reassessments by petitioning to modify or revoke them under
13 Section 346a(d). The plain language of Section 346a(h) requires
14 that this kind of challenge, along with any other issue for which
15 review could be obtained under Section 346a(h), proceed under
16 this subsection to the preclusion of "any other provision of
17 law." 21 U.S.C. § 346a(h)(5).

18 Moreover, the NRDC Appellants' reliance on Sections
19 346a(q)'s "silence" as to judicial review is unavailing. Nothing
20 in Section 346a(q) countermands Section 346a(h)(5)'s
21 applicability to decisions to leave tolerances in place. Indeed,
22 Section 346a(q) speaks solely to those actions required of the
23 EPA, not those of other parties. Under Section 346a(q), if the
24 EPA determines that a tolerance should be left in effect, there

1 is nothing more for the EPA to do. Any additional steps
2 necessary for objecting parties to challenge decisions to leave
3 tolerances in effect is not the subject of Section 346a(q).
4 Instead, Section 346a(h) governs these kinds of challenges, which
5 must be brought in the first instance pursuant to the procedures
6 in Sections 346a(d) and (g).

7 Furthermore, those cases cited by the NRDC Appellants as
8 supporting district court jurisdiction are quite distinguishable
9 from the present case. In NRDC v. Whitman, No. 99-03701, 2001 WL
10 1221774 (N.D. Cal. Sept. 24, 2001), the NRDC sued the EPA in
11 district court for failing to meet the statutory deadlines for
12 tolerance reassessment under Section 346a(q). The district court
13 found that it had jurisdiction over the plaintiffs' claims
14 because Section 346a(q) (3) specifically states that "failure to
15 take final action pursuant to the schedule established by this
16 paragraph shall be subject to judicial review." Id. at *10
17 (quoting 21 U.S.C. § 346a(q) (3)) (emphasis in original). The
18 district court, therefore, had jurisdiction over these claims
19 based on specific language in Section 346a(q) (3), not because all
20 actions and decisions under Section 346a(q) are somehow outside
21 the scope of Section 346a(h)'s judicial review scheme.

22 The NRDC Appellants also rely on American Farm Bureau v.
23 EPA, 121 F. Supp. 2d 84 (D.D.C. 2000). In American Farm Bureau,
24 the plaintiffs challenged, inter alia: (i) the EPA's failure to

1 promulgate regulations governing tolerances for emergency
2 exemptions pursuant to Section 346a(1)(6); (ii) the EPA's failure
3 to promulgate data requirements for tolerances pursuant to
4 Section 346a(d)(2)(A); (iii) the EPA's imposition of a 99.9th
5 percentile policy that created a "legislative rule" in violation
6 of the APA's notice and comment requirements; and (iv) the EPA's
7 imposition of a child and infant safety factor policy that also
8 formulated a "legislative rule" in violation of APA notice and
9 comment requirements. Id. at 89-90, 93. The EPA argued that
10 each of these challenges sought to compel the issuance of
11 "general procedures" under Section 346a(e)(1)(C) and, as such,
12 were only reviewable in the courts of appeals under Section
13 346a(h). The district court disagreed and found that it could
14 exercise jurisdiction over the plaintiffs' claims. Id. at 91,
15 92-93. Because Section 346a(e)(1)(C) governed discretionary
16 action only and the plaintiffs' claims were based entirely on
17 statutorily mandated actions, none of the claims fell within the
18 scope of appellate review contemplated by Section 346a(h). Id.
19 at 93-94.

20 The present case is distinguishable from American Farm
21 Bureau because the plaintiffs there were challenging the EPA's
22 general policy decisions and failure to issue regulations. These
23 issues could not have been raised using Sections 346a(d) or (g),
24 as these subsections are limited to petitions for establishing,

1 modifying, or revoking specific tolerances, not the general
2 policies and standards under which the tolerances are assessed in
3 the first place. On the other hand, the NRDC Appellants here are
4 challenging specific tolerance reassessments -- the failure to
5 apply the correct policy and standards to particular pesticide-
6 food pairs. These claims could have been addressed using the
7 procedures in Sections 346a(d) and (g), and thus (h).

8 Because the NRDC Appellants' claims involve issues that
9 could have been raised using the procedures enumerated in Section
10 346a(h), this section controls and judicial review is limited to
11 the courts of appeals.

12 d) Judicial Review Under FIFRA

13 Even if the FFDCA precludes review of their claims under the
14 APA, the NRDC Appellants claim that FIFRA Section 16a, 7 U.S.C. §
15 136n(a), provides an alternative ground for jurisdiction.

16 Section 16a states:

17 Except as otherwise provided in this
18 subchapter, the refusal of the Administrator
19 to cancel or suspend a registration or to
20 change a classification not following a
21 hearing and other final actions of the
22 Administrator not committed to the discretion
23 of the Administrator by law are judicially
24 reviewable by the district courts of the
25 United States.

26
27 7 U.S.C. § 136n(a). The NRDC Appellants attempt to avail
28 themselves of Section 16a by claiming that the EPA used a
29 confidential computer model to conduct pesticide exposure

1 assessments even though under FIFRA such a model must "be
2 available for disclosure to the public." 7 U.S.C. § 136h(d)(1).

3 However, FIFRA's grant of jurisdiction to the district
4 courts is irrelevant. The NRDC Appellants "challenge the
5 registration of pesticides under FIFRA only through their
6 challenge to the tolerances set under the FDCA." New York v.
7 United States EPA, 350 F. Supp. 2d at 446. Essentially,
8 therefore, the violations of FIFRA alleged by the NRDC Appellants
9 "amount to challenges to the methodologies used in reaching the
10 reassessment determinations at issue" in this case. Id. As
11 such, these challenges represent an "issue as to which review is
12 or was obtainable" under Section 346a(h). 21 U.S.C. §
13 346a(h)(5). Section 346a(h)(5) precludes judicial review of
14 these issues "under any other provision of law." The NRDC
15 Appellants' attempt to find independent jurisdiction for their
16 claims under FIFRA is thus precluded by the express language of
17 Section 346a(h)(5). The NRDC Appellants' claims are reviewable
18 only in the courts of appeals, and only after they have exhausted
19 the statutory provisions for administrative review.

20 CONCLUSION

21 For the foregoing reasons, the district court properly
22 dismissed the complaint for lack of subject matter jurisdiction.
23 The decision of the district court is therefore affirmed.

FOOTNOTES

1. EPA Administrator Stephen L. Johnson is substituted as Defendant-Appellee. See Fed. R. App. P. 43(c)(2).

2. An action filed by the states of New York, New Jersey, Connecticut, and Massachusetts was consolidated with the NRDC Appellants' action because both lawsuits challenged the safety of certain EPA pesticide reassessment decisions, and thus involved common questions of fact and law. Although the district court's order and opinion dismissed both lawsuits, the state plaintiffs have not appealed.

3. An issue is defined as "[a] point in dispute between two or more parties" and is not limited to particular kinds of actions. Black's Law Dictionary 835 (7th ed. 1999); see also Webster's Third New Int'l Dictionary 1201 (1981) ("a matter that is in dispute"; "a point in question in law or fact").

4. Section 346a(h)(1) also permits review of regulations issued under Section 346a(e)(1)(C) and orders issued under 346a(f)(1)(C). These regulations and orders are not at issue in this case; therefore, our analysis is limited to those orders issued pursuant to Section 346a(g)(2)(C).

5. Section 346a(g)(2)(A) permits “any person” to object to a regulation or order “issued under subsection (d)(4), (e)(1)(A), (e)(1)(B), (f)(2), (n)(3), or (n)(5)(C)” For purposes of this case, however, we are only concerned with Section 346a(g)(2)(C) orders issued in response to an objection to an order issued under Section 346a(d)(4).